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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 157

CIVIL AERONAUTICS BOARD,

Petitioner,

v.

STATE AIRLINES, INC.,

Respondent.

No. 158

STATE AIRLINES, INC.,

Cross-Petitioner,

v.

CIVIL AERONAUTICS BOARD and
PIEDMONT AVIATION, INC.,

Cross-Respondents.

No. 159

PIEDMONT AVIATION, INC.,

Petitioner,

v.

STATE AIRLINES, INC.,

Respondent.

REPLY BRIEF OF STATE AIRLINES, INC.

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December 2, 1949.

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REPLY BRIEF OF STATE AIRLINES, INC.

1. CONTRARY TO THE ARGUMENT OF THE BOARD AND PIEDMONT AND THE CHARTS SUPPLIED IN CONNECTION THEREWITH, THE RECORD DOES NOT SUPPORT THE CONTENTION THAT PIEDMONT'S APPLICATION WAS BROADER IN SCOPE THAN STATED BY THE COURT BELOW.

The only certificate of public convenience and necessity involved on this appeal is the one issued to Piedmont author

izing it "to engage in air transportation with respect to *persons*, property, and mail, as follows",* listing the routes connecting Louisville, Ky., and Cincinnati, Ohio, with Norfolk, Va., New Bern and Wilmington, N. C., and a connecting route from Wilmington to Roanoke (R. 626). Piedmont's application for pick-up service was specifically denied and Piedmont took no appeal from such denial (R. 565 [902]).

Nevertheless, in seeking to escape from the patent shortcomings of Piedmont's application to support the certification made, Piedmont openly and the Board more subtly** seek to enlarge the scope of Piedmont's passenger, mail and property application by adding thereto Piedmont's application for pick-up service (Pied. Br., pp. 4, 11-13) and Piedmont seeks to credit itself with points in an application (the one of May 29, 1944) which was expressly abandoned*** (Pied. Br., pp. 3, 11-12).

Piedmont calls attention to a map opposite page 3 of its brief designated as "Chart I" and bearing the legend "Specific Routes Proposed By Application dated May 29, 1944". This chart is then utilized in the text as the foundation for an argument "that Piedmont's original application specifically proposed service to all of the points included in the certificate" with the

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*Emphasis ours throughout unless otherwise indicated.

**The Board accomplishes this purpose by referring to both portions of Piedmont's application together to give the impression that the total mileage and points covered are material in determining whether Piedmont was an applicant for the transportation certificated (see Board Br., pp. 5, 28, 48).

***Nor is the Board entirely above reference to that abandoned application to support its argument (Board Br., p. 27) and the Board's explanation of the amendment, which completely superseded the original proposal of combined pick-up and passenger service, is neither clear nor complete (*id.*, pp. 27-8).

exception of those in Kentucky (Pied. Br., pp. 11-12). Piedmont nowhere advises the Court of the conceded fact that the proposals in this application were for the unsafe combined pick-up and passenger service and were entirely abandoned by amendment before any hearings were held by the Board (R. 31; 63-70).

With respect to Chart 2, opposite page 4 of Piedmont's brief, Piedmont neither on the face of the chart nor in the text advises this Court that the broken lines on the chart involve only an application for authority to transport "mail, express and property *using the pick-up method*" (R. 64). This method serves points without stops, picking up mail and other light weight property from ground installations by a device on the plane while in flight (*All American Aviation, Pick-up, Delivery Service*, 2 C. A. B. 133, 137, fn. 3). Such service needs no airports except the termini and is obviously unsuited for passengers and the conventional transportation of property certificated in the present case. Indeed, the Board has held that the combination of pick-up and passenger service is unsafe and will not be authorized (*All American Aviation, Combination Service*, 8 C. A. B. 241, 242).

Piedmont's italicized argument that its amended application contained a request to carry *"passengers"* over *"all the routes described in the application"* (Pied. Br., p. 12), is entirely unsupported by the record. Piedmont's citation to R. 41 refers to the general prayer for relief contained in its superseded application for combined pick-up and passenger service and the only other citation (R. 63) refers to the introductory paragraph of the amended application in which Piedmont seeks authority to operate both "scheduled airmail pick-up and local passenger air service * * * as follows * * *". What follows is a request

which distinctly separates the "AUTHORITY SOUGHT" into (1) that relating to pick-up service with respect to one series of points (R. 64) and (2) that relating to passenger and conventional property service with respect to different and much more limited routes (R. 69). The two types of service were separate and distinct. Indeed, it is fantastic to suggest that passengers were to be snatched from ground installations and hoisted into planes while dangling from the end of pick-up lines or were to be returned to the ground in a similar manner.

As only transportation of passengers and conventional transportation of property were certificated, it is obvious that an application for property pick-up service is of no avail under the statute limiting the Board's right to certify "the whole or any part of the *transportation* covered by the application" (Civil Aeronautics Act, § 401[d][1]). The broad word "transportation" used by Congress encompasses both the type of service to be rendered and the nature of the geographical routes to be covered.

Furthermore, even the pick-up service does not bear the slightest geographical resemblance to the routes certificated by the Board (cf. Map No. 1 [R. 676] and Chart 2, Pied. Br., p. 4).

This record shows that Piedmont's passenger application was limited, as we have heretofore pointed out and as the court below stated, to routes east of the Appalachian Mountains principally intended to connect points in the Carolinas with Washington, D. C., and Norfolk, Va. (R. 69-70). Therefore, contrary to the statement in Piedmont's brief (pp. 4, 12), Map No. 1 embodied in the opinion of the court below (R. 676) contains exactly and precisely the points covered by Piedmont's

passenger application.* The green lines on the court's Map No. 1 are identical with the solid red lines appearing on Piedmont's Chart 2.

The Board likewise has annexed as an appendix a chart containing the broken red lines covering Piedmont's proposed pick-up service and solid red lines indicating Piedmont's proposal with respect to the type of transportation covered by the certificate. Here, again, the broken red lines are immaterial for pick-up service was not certified and the solid red lines correspond exactly to the green lines appearing on the court's Map No. 1 (R. 676).**

With this exposition of the actual facts, most of the arguments advanced by the Board and Piedmont are dispelled. It is perfectly plain (1) that the Piedmont application did not cover the routes certificated, (2) that the Piedmont application did not cover substantially the routes certificated, and (3) that the question here is not whether the Board may certificate one or two or even several adjacent or intermediate points to an applicant who has substantially covered the transportation certificated but the question is whether the Board has power under the statute to issue a certificate covering transportation entirely different from that covered by the application. That is the question which the court below answered in the negative.

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*The court did not state, as Piedmont argues, that only a part of Piedmont's passenger routes were set forth in the map in question. In explaining the use of maps, the court below pointed out that Map No. 1 showed all the routes over which Piedmont sought authority to "carry passengers, mail, express, and property" pursuant to the only application upon which it went before the Board (R. 679, and fn. 5).

**The confusion engendered by other lines on the Board's map hardly leads to an understanding of the present issues. The "composite routes" are particularly unfair in that they leave the inference that there were applicants other than State for the certificated routes here involved. That is not the case. If the composite applications were broken down so that each application were shown separately, it would be apparent that only State applied for the route pattern and type of service which the Board found was required by public convenience and necessity.

2. THERE IS NO SUBSTANCE IN THE ARGUMENT THAT THE BOARD HAD POWER TO CERTIFICATE PIEDMONT ALTHOUGH ITS APPLICATION DID NOT COVER SUBSTANTIALLY THE TRANSPORTATION CERTIFICATED (Reply to Board Br., pp. 18-25; Pied. Br., pp. 24-9).

The Board's argument is confined to several appealing generalities without any regard to the issue here involved. The only question of statutory construction is whether, when Congress has limited the power of the Board to issue a certificate to one "authorizing the whole or any part of the transportation covered by the application", the Board may disregard that limitation and issue whatever certificate it may deem expedient according to its view of the public interest.

The Board contends that an administrative agency without regard to issues tendered "by the moving papers in the proceeding", "may in a proper case take such action as inquiry reveals to be required in the public interest" (Board Br., pp. 18-19). This proposition is stated more broadly than permitted by the authorities cited and has nothing to do with the present question. The cases hold only that an administrative agency, after adequate notice, may make a complete investigation under its regulatory powers and, on the basis of such investigation, take whatever action is *authorized by the statute* which such agency administers. With that principle we have no quarrel. The cases involved have nothing to do with power of an agency to issue a certificate of public convenience and necessity under express limitations imposed by Congress, but deal rather with an agency's general regulatory powers. The cases might have some relevancy had the present proceeding been one under Section 401 (h) of the Civil Aeronautics Act (State Br., App. A, p. v) where the Board "upon petition or complaint

or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require * * *". There, indeed, as the Board so eloquently argues, "the public interest is the touchstone for the exercise of agency authority" (Board Br., p. 20) and the Board, in such a proceeding, may take whatever action the statute authorizes upon any issues with respect to which it has given the applicants notice. That was the holding in this Court in *Labor Board* v. *Mackay Co.*, 304 U. S. 333, and *Cincinnati &c. Ry. Co.* v. *Inter. Com. Com'n.*, 206 U. S. 142 (Board Br., p. 19).

But this Court has never decided that an administrative agency, in order to give effect to its interpretation of the public interest, may disregard a specific Congressional limitation upon its powers such as that here limiting the power to certificate under Section 401(d) of the Act to "the whole or any part of the transportation covered by the application". On that point this Court's view seems authoritatively stated in *U. S.* v. *Carolina Carriers Corp.*, 315 U. S. 475, and *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144 (State Br., pp. 57-9).

The cases under the Motor Carrier Act such as *Chicago, St. P., M. & O. Ry. Co.* v. *U. S.*, 322 U. S. 1, and *Alton R. Co.* v. *United States*, 315 U. S. 15 (Board Br., p. 19), have already been fully disposed of (State Br., pp. 61-2).

None of the cases cited by the Board (pp. 19-20) stand for the proposition that the Federal Communications Commission has been permitted to grant radio licenses authorizing a signal of greater strength than that requested or the construction of a station differing from the one proposed by the applicant. On the contrary, those cases, while not in point here because they are apparently dealing with the question of proper notice not with that of power of the Federal Communications

Commission, fully support State's point of view. Thus, in *Woodmen of the World L. Ins. Soc.* v. *Federal C. Com'n*, App. D. C., 105 F. 2d 75, the court said (p. 77):

> "After the first hearing, the Commission granted a permit inconsistent with the application, so as to require towers almost twice as high as those considered in the expert testimony presented on the issue of interference at that time. *This should not have been done*, but that permit was subsequently revoked and a new hearing ordered at which WOW was given notice and opportunity to meet the issue arising from 257-foot towers required by the new engineering standards then in effect."*

The Board next contends that it has in its own prior decisions construed the Civil Aeronautics Act in such a way that the plain limitations imposed by Congress have been disregarded in "area proceedings" (Board Br., pp. 20-4).

An area proceeding is merely a proceeding in which the Board, for its own convenience, has consolidated for hearing several applications in a particular area (R. 27). In the present case, as the Board states, the area covered by the consolidated proceeding included the whole southeastern section of the country from points in Missouri, Indiana, Ohio, Kentucky and

*In *WREC* v. *Federal Radio Commission*, App. D. C. 67 F. 2d 578, the court likewise held that an order addressed to an issue not raised by the pleadings (that is the reduction of power for an intervening station), although the proper solution of the problem in the interest of the public, "cannot be entered by the commission in the present proceeding" (p. 579). The increase in wattage which was authorized had been applied for and the only question was whether the Board's order permitting increase in regular wattage was justified by an application for the increased wattage as "experimental power". Under the statute involved, the court was of the opinion that there was nothing wrong in this as the issue involved was the same and had apparently been fully litigated. This is especially true as all radio station licenses are temporary in any event (47 U. S. C. § 307 [d]).

the District of Columbia to Mississippi, Alabama, and Florida (Board Br., p. 4). It is the Board's contention that where such a consolidation has taken place the Board is entitled first to determine the public need for service in that area and then to select any party whose application has been consolidated in the proceeding to receive a certificate for transportation without regard to the scope of that person's application.

There is nothing in the Civil Aeronautics Act and the Board cites to nothing therein which increases the Board's power because it chooses to delay the consideration of applications until it has enough on hand to consolidate them into an "area" proceeding. As far as the statute is concerned, whether an application is considered alone, in company, in a consolidated proceeding, or otherwise, the ultimate power of the Board is limited to "authorizing the whole or any part of the transportation covered by the application". Even if the Board had in previous decisions taken a contrary view, such construction would have to be disregarded by the courts. As we have shown, however, the Board has consistently recognized the limitation upon its powers in a series of cases all of which were either designated as area proceedings or were such in fact because more than one application was being considered pursuant to an order of consolidation.*

The Board's principal reliance (except for its decision in the present case) is on the *New England Case*, 7 C. A. B. 27, 31 (Board Br., pp. 20-1). There could be little doubt as to the meaning of language quoted by the Board from this case had the Board continued its quotation to the end of the paragraph from which the language is taken. There the Board stated that as a result of its consideration of a "sound over-all air transportation pattern in the area involved" it "may depart

*See cases cited and discussed in State's brief, pp. 54-5, 65-7, 71-3.

somewhat from the arrangement of points in the applications" (7 C. A. B. 31). And that is all the Board seems to have done up to the time of the present case. As we have previously shown (State Br., p. 54, fn.) the Board in the *New England Case*, having found necessity for east-west routes, turned down the applications of Norseman and Northern in spite of the broad catch-all clauses because their applications covered "a series of routes which are predominantly in a north-south direction *through this area* and none of them correspond to those which we have found to be authorized" (7 C. A. B. at p. 39).

The other cases* cited by the Board in footnotes (Board Br., pp. 21, 23) are, with two exceptions, cited generally and we can find nothing in the cases to support the Board's argument that in area proceedings it has awarded routes differing in substance from those proposed by the successful applicants. The two cases cited specifically are stated to be authority for the holding (Board Br., p. 23, fn. 12) that in each a single point adjacent to the routes requested was added in the certification of a single applicant. *Mid-Cont. Air., Twin Cities-St. Louis Operation*, 2 C. A. B. 63; *National Air. et al., New Orleans-Fort Worth*, 4 C. A. B. 278. The same may be said of *Rocky Mountain States Air Service*, 6 C. A. B. 695, relied upon by Piedmont (Pied. Br., p. 20), where a single adjacent point was added in the certification. These dispositions are entirely consistent with the decision below (R. 681).

While Piedmont argues (Pied. Br., p. 20) that in *North Central Case*, 7 C. A. B. 639, Iowa Airplane Co. was certified

*It will be noted that most of the cases cited are the same as cases upon which we have placed reliance. In State's main brief, however, we have cited to the specific pages of those decisions which show that the Board, in area proceedings, has consistently followed the rule of rejecting the applicant whose application does not cover the routes found required by the public interest (State Br., pp. 54-5, 65-7, 71-3).

for routes far more extensive than its application, the Board certainly was not under the impression that such was the case (see 7 C. A. B. 678-9). Contrary to Piedmont's argument, the Board did not base its certification upon any catch-all clause and in making the certification it did not even refer to such a clause (*id.*, pp. 678-9). Indeed, the *North Central Case* is one of the principal cases in which the Board has recognized the limitation upon its power applied by the court below. In rejecting the application of Midwest the Board did so for the very reason that while Midwest was fit, willing and able to operate the route covered by its application, that application did not cover the route to be certificated (*id.*, p. 674).

Entirely different considerations govern certifications in foreign route cases which both Piedmont (Pied. Br., pp. 19-20) and the Board (Board Br., pp. 21, 23) emphasize. The statutory provision dealing with foreign route certifications states that a certificate for such transportation need designate terminal and intermediate points "only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed" (Civil Aeronautics Act, § 401 (f); State's Br., App. A, p. iv). This provision, entirely inapplicable to domestic route cases, the Board applied in *Northeast Air. et al., North Atlantic Routes,* 6 C. A. B. 319 (Pied. Br., p. 19; Board Br., p. 23). There the Board had issued a letter suggesting to each applicant the inclusion in its application of a proviso "that the applicant will serve any point within the general area covered by its application to which the Board finds service required by the public convenience and necessity" (6 C. A. B. at p. 346). This having been done, there should have been no question at all, in light of the special statutory provisions, as to the power of the Board to make the certifications which it did make. The Board, however, felt impelled to argue at length

that it could make the certifications in question although they differed very slightly from the applications actually filed (6 C. A. ~~B. at~~ pp. 345-50).

Piedmont's discussion (Pied. Br., pp. 19-20) of the *North Atlantic Route* case is at variance with the facts. Piedmont states that American Export Lines applied only for routes across Central Europe but was awarded routes across Northern Europe. The fact is, as the Board states (p. 345), that Export applied for European routes to Moscow and London, via Berlin, Warsaw and Scandinavia. Piedmont states that Pan American had applied only for a northern and southern route across Europe and was awarded a central route. But the Board, in describing the Pan American application, states (p. 348):

> "In Europe it [the transportation certified] falls between the specific points requested beyond London to Moscow and the specific points requested beyond London to Calcutta, and clearly lies within the 'general area' of Central Europe covered by the route pattern set up in the application."

As to TWA, Piedmont states that it had applied only for a central route across Europe and was awarded a southern route. The fact is, as the Board states (p. 349), that TWA had specifically applied for a route touching, among other Southern European points, Athens, Greece; Bari, Italy and Lyon, France (6 C. A. B. pp. 349-50).

If, as the Board suggests, its former decisions are to have controlling effect upon the question of construing the statutory limitation upon its power to issue certificates, it is submitted that the uniform trend of the Board's decisions is entirely in favor of the result reached by the court below.

The Board's final argument (Board Br., pp. 24-5) is that if notice is given (as the Board claims was here the case, although State denies this, see pp. 19-24, *infra*), then the Board may depart entirely from the statutory limitation and certify any applicant who happens to be before it for any route whatever. For the purpose of determining the limit of the Board's statutory power, however, notice makes no difference. If the Board had cried from the housetops that it intended to award to Piedmont a route not covered by Piedmont's application, that would not make the certificate here issued legal. The question is not of notice but of statutory power. Mere notice that an agency intends to exceed the limits of its power does not make such excess legal.

Piedmont's argument as to the Board's power is not joined in by the Board itself and has little merit. Its suggestion (Pied. Br., pp. 24-8) is that, in view of Section 401(f) of the Civil Aeronautics Act, the limitation upon the Board's power contained in Section 401(d) must be disregarded. Thus Piedmont contends that because the Board is authorized to attach " 'to the exercise of the privileges granted by the certificate * * * such reasonable terms, conditions, and limitations as the public interest may require' ", it may authorize transportation to points entirely different from those covered by the application. A mere statement of this proposition seems enough to expose it. By conferring upon the Board the power to add limitations, terms and conditions, Congress can certainly not be assured to have intended to legislate out of existence a limitation imposed upon the power to certificate in the preceding subsection of the Act.

Piedmont's reliance upon *Chicago, St. P., M. & O. Ry. Co. v. U. S.*, 322 U. S. 1 (Pied. Br., pp. 26-7), is misplaced. As we have shown, the only power there accorded to the Interstate

Commerce Commission was the power to include some intermediate points in the certification (State Br., pp. 61-2). Furthermore, the *Omaha Railway* case becomes entirely inapposite if heed be given to Piedmont's argument that the decision was based upon Section 208(a) of the Motor Carrier Act, which Piedmont claims is like Section 401(f) of the Civil Aeronautics Act (Pied. Br., p. 26). These two statutes appear alike in Piedmont's brief only because Piedmont terminates its quotation of Section 208(a) at the very point where it differs materially from Section 401(f). Following the portion of the section quoted by Piedmont, Congress particularly included the power on the part of the Interstate Commerce Commission to attach conditions "including terms, conditions, and limitations as to *the extension* of the route or routes of the carrier" (49 U. S. C. § 308). Congress, when it enacted Section 401(f) of the Civil Aeronautics Act in 1938, omitted the language which it had included in the Motor Carrier Act in 1935. The Civil Aeronautics Act confers no power to issue new certificates covering transportation other than that included within an application..

The Court below has construed the statutory provision in question as liberally as it can possibly be construed when it held (R. 681):

> "... we have not said, and we do not wish to be understood as ruling, that the Board may not take advantage of a 'catch-all clause' in an application by granting routes which represent slight deviations from those proposed."

The examples then listed, indicating the propriety of granting a certificate to cover intermediate and adjacent points not expressly covered by the application, extend the Congressional

grant of power in keeping with this Court's tenets of liberal and reasonable construction.

3. THERE IS NO BASIS IN THIS RECORD FOR A CONTENTION THAT PIEDMONT'S APPLICATION IN FACT COVERED THE ROUTES CERTIFICATED (Reply to Board Br., pp. 25-30; Pied. Br., pp. 11-22).

Piedmont and the Board contend that whether or not the Board complied with the statutory limitation contained in Section 401(d) of the Civil Aeronautics Act is a question of fact. Both then contend, in essence, that the Board, having found that Piedmont's application was sufficient under the statute, the court below had no authority to upset the finding.

The difficulty with these contentions is that neither the premise nor the conclusion is justified. There is no finding of fact in the record that Piedmont was an applicant for the transportation covered by the certification. Indeed, it is significant that while the Board, in discussing other applicants, called attention to routes requested, it refrained from doing so in the case of Piedmont (R. 565 [898-902]). The question of whether Piedmont was an applicant for the transportation certificated did not concern the Board at all when it made its original decision and neither Piedmont nor the Board now contend that any finding of fact covering the point at issue was made in the original decision.

The present contention (Board Br., pp. 25-6, 28-9; Pied. Br., p. 11) is that upon reargument the Board found as a fact that Piedmont was an applicant for the transportation certified. The record, however, shows that upon reargument the Board proposed to decide the question [1] re involved purely as a matter of law. The order permitting reargument limited it to two questions (R. 591):

> "(a) whether the public interest requires the selection of State or Piedmont, and (b) whether the Board *committed legal error by awarding the route to Piedmont;* * * *"

The Board's only decision as to the sufficiency of Piedmont's application to support the certification was in connection with resolving the second question—whether any legal error had been committed (R. 614-7).

Piedmont seeks to bolster its contention as to the binding nature of the Board's determination by the claim that the court below conceded the question here involved to be "a fundamental question of fact" (Pied. Br., p. 11). At the place cited by Piedmont, the court actually held (R. 681):

> "To be sure, the decision of what is or is not a modification of a given set of proposed routes is one which resolves itself in a fundamental question of fact and we recognize that it is not the function of this court to find fact or to substitute its judgment for that of the administrative tribunal on pure questions of fact concerning which opinions may reasonably differ. *However, that is not this situation.* We here rule, on the facts presented and uncontroverted, that no reasonable mind could conclude that the routes awarded in this case to Piedmont were merely a modification of the routes proposed by it. The implied finding by the Board that Piedmont was an applicant for the routes awarded lacks the support of any evidence, substantial or otherwise."

This appears to be a correct application of the law. Neither the Board nor Piedmont point to any facts supporting the argument that the court below in so holding "completely ignored the evidence of the record upon which the Board relied to support its finding" (Board Br., p. 26).

Piedmont's application was written as required by the Board rules (R. 63-70). Its application for authority to conduct transportation of passengers, mail and property lists unambiguously the routes sought (R. 69-70). There is no room for dispute. True, Piedmont's passenger application covered 1,400 miles and its pick-up service, which is here immaterial, covered 4,300 miles. But this mileage connected entirely different points and ran in entirely different directions from that certificated by the Board. Unless this Court is to accept the legal argument that an application anywhere within the area encompassed in an "area proceeding" is the equivalent of an application for the routes certificated, there is no evidence in this record to support a conclusion that Piedmont was an applicant for the transportation certificated to it.

Little need be added to State's previous discussion as to the meaning and significance of the "modification" clause appearing in Piedmont's application (see State Br., pp. 51-7). The grammatical contortion indulged in by Piedmont (Pied. Br., pp. 14-6) in an endeavor to persuade this Court that black can be said to mean white, defeats its own purpose. The more involved the argument, the less persuasive must be the result, for we are not dealing with any technical terminology but with words in their ordinary everyday connotation.

The Board's additional suggestion that Piedmont's application should be broadly construed because at hearing and argument Piedmont indicated its desire for such construction (Board Br., pp. 29-30) is supported by two record citations, both of which lead to precisely the contrary result.

The first citation (R. 470) refers to the testimony of Piedmont's President, in answer to a question of whether he would be willing to serve an intermediate point some fifteen miles from a point specifically designated in his application, and he an-

swered that he would be willing to do so and would like to have it understood "that any point not included on our proposed routes, *which are along our proposed routes, and which would not materially upset our plan of operation,* that the Civil Aeronautics Board saw fit for us to service, we would be delighted to serve it". That carefully-guarded answer limits the modification clause even more narrowly than our argument and certainly more narrowly than did the decision below which held it sufficient to encompass not only points "along our proposed routes" but adjacent points beyond the terminals (R. 681).

The other citation is to a statement by counsel, made more than a year after the hearings were closed, in which he suggested that Piedmont would be glad to add Charleston— one additional point—to the route but adhered to Piedmont's position that such addition "seems to be a little out of the sphere of the primary local interests of those cities", that is, the ones which Piedmont proposed to serve (R. 554).

Unless the Board is the sole judge of whether an application is sufficient under the statute to sustain the certification, there can be no doubt as to the correctness of the decision below that Piedmont was not an applicant for the routes certificated. But the propriety of judicial review on that issue is established by Section 10(e) of the Administrative Procedure Act (State Br., App. A, p. x), the recent decision of this Court in *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 109 (State Br., pp. 44-5), as well as authorities such as *Roberts, Treasurer,* v. *United States,* 176 U. S. 221, 237, and *Wilbur* v. *Krushnic,* 280 U. S. 306, 318-9 (see Vom Bauer, *Federal Administrative Law* (1942), Vol. 1, pp. 437-8).

4. IF THE PIEDMONT APPLICATION SHOULD BE HELD ADEQUATE TO SUPPORT THE CERTIFICATION, THEN PROCEDURE REQUIRED BY LAW WAS NOT OBSERVED (Reply to Board Br., pp. 30-42; Pied. Br., pp. 23-4).

Near the conclusion of its argument, the Board states "Due process, however, deals with matters of substance, and its lack is not established by mere formal objections that have no substantial bearing on the rights of the parties" (Board Br., p. 41). With this we agree entirely. Acceptance of this proposition disposes of the minutiae to which the Board calls this Court's attention in an endeavor to show that State should have been aware of aspirations which Piedmont never expressed.

To look at matters of substance, the following was the situation when State went before the Board:

1. As to Piedmont, the statute limited the Board's power to issue a certificate to one "authorizing the whole or any part of the transportation covered by the application" of Piedmont (Civil Aeronautics Act, § 401[d]).

2. No decision by the Board intimated that this limitation could be disobeyed, and that routes entirely different from those applied for could be certificated (State Br., pp. 54-5, 65-7, 71-3; pp. 10-12, *supra*).

3. Piedmont's application for passenger, mail and property service was strictly limited to points east of the mountains, to routes running principally in a north and south direction and bore no resemblance whatever to the routes proposed by State (R. 69-70; State Br., pp. 4-6, 7-9). The modification clause in Piedmont's application both on its face and as a matter of construction by the Board itself in the cases previously decided

(State Br., pp. 54-5; see also pp. 65-7) did not operate to make Piedmont a candidate for routes entirely different from those specifically covered.*

4. Piedmont's only explanation in the record of its application limited it with respect to unnamed points to those "along our proposed routes, and which would not materially upset our plan of operation" (R. 470).

5. After the examiners' report had awarded to State a trans-Appalachian route and to Piedmont only a route east of the mountains predominantly in a northerly and southerly direction, Piedmont filed no exception (a) to the failure to award to Piedmont east-west routes to Ohio and Kentucky, or (b) to the award to State of the trans-Appalachian route (R. 533-4).

Those are the substantial and undisputed facts. They demonstrate that State was never advised and, in the nature of things, could not have been advised of any issue relating to Piedmont's aspirations to the routes applied for only by State. This deprived State of the right to be advised of "matters of fact and law" to be "asserted" in the administrative proceeding

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*In this connection note *W. R. Grace & Co.* v. *Civil Aeronautics Board*, 2 Cir., 154 F. 2d 271 (relied upon by Piedmont [Pied. Br., p. 22]), in which the court said (p. 280):

> "But the scope of this proceeding (No. 779) is to be measured, we think, by the directory part of the Board's order of September 10, 1942; not by its recitals, save as these may be necessary to throw light upon the rest; *nor by what the parties said in their arguments and briefs, or in the course of the hearings.* Of course, we do not mean that the order finally fixed the issues; but we think it did so *in the absence of some amendment plainly intended to change them.*"

Piedmont's reliance upon its quotation from this case (Pied. Br., p. 22) is misplaced for that language, as the quotation shows, dealt with Section 401(h) not with new certifications under Section 401(d).

(Administrative Procedure Act, § 5(a), (b) [State Br., App. A, p. viii]; *Morgan* v. *United States*, 304 U. S. 1; State Br., pp. 64-5).

But the Board contends, nevertheless, that State "should have known" of the action which the Board might take (Board Br., pp. 30-6).

Local, Feeder, and Pick-up Air Service, 6 C. A. B. 1, is cited for the proposition that in feeder cases the Board first determines the routes required in the public interest and thereafter selects the best qualified applicant for the certificate (Board Br., pp. 30-1). Nothing in this case so holds. As a result of complete consideration given to an area in a consolidated proceeding, the Board does not, as it now contends, select *one* applicant to render the service required but, on the contrary, the Board certifies *several* applicants in accordance with their applications to render the service found necessary. In every area proceeding case cited by either party herein, it will be found that this was the case. In the present proceeding many certificates of public convenience were issued to many applicants (R. 565 [914-25]; R. 626-7).

Nor does the existence of "catch-all"* clauses in applications indicate, as the Board now contends (Board Br., pp. 31-2), an understanding that the scope of applications will be disregarded. Such clauses enable the Board to shorten routes applied for, to rearrange points covered by the application and compel service to intermediate or adjacent points on routes specified (see cases cited State Br., pp. 54-5, 65-7). In spite of many very broad catch-all clauses in the present proceeding (R. 665-70) not a single one of the applicants (except Piedmont

*The "modification" clause in Piedmont's application does not even rise to the status of a catch-all clause (see real catch-all clauses [R. 665, 667-70]).

after the original decision had handed it a most unexpected windfall) took the position that it was entitled to routes or route patterns other than the ones specifically applied for.

While the examiners in their pre-hearing conference report did refer to the purpose of catch-all clauses, as the Board states (Board Br., p. 32), such report gave no intimation to anyone that a "catch-all" clause would permit certification of one who had not applied at all for the transportation in question. If that had been the purpose, there would be no need for filing amendments and yet the conference report pointed out that the examiners had required "all amendments to applications consolidated in this proceeding must be filed within ten days" (R. 671). Thereafter, referring "to the so-called catch all clause", the examiners stated (R. 671):

> "* * * while there is no objection to the use of this clause for the purpose of enabling the Board to grant a certificate to a point or points not specifically named in the application, the use of the catch all clause will be limited specifically to that purpose and *no evidence will be received with respect to cities or routes which are not specifically set forth in the application.*"

If the Board's contentions are accepted, the examiners were authorized to recommend and the Board to certify routes with respect to which the examiners had specifically excluded all evidence. More arbitrary or capricious conduct is hard to imagine. The examiners' statement apprised the applicants that the use of "catch-all" clauses would be limited to permit the Board to deal with intermediate and closely adjacent points which were in fact covered by an application although not, as the examiners stated, "specifically named" therein.

The references by the Board to testimony (Board Br., pp. 32-3) and statements of counsel (Board Br., pp. 34-5) to the

effect that other companies would be willing to serve points which the Board might designate in addition to those specifically mentioned, taken in their context indicate only a willingness to serve intermediate or adjacent points (see [R. 688-9] unprinted certified Transcript of Record to which reference is made in the printed record at places cited by the Board).

Such statements do not indicate in any way that State should have recognized Piedmont as a competitor for the trans-Appalachian routes covered only by State's application. This conclusion is perfectly clear from the Board's long quotation of a statement made by counsel representing State in the proceedings before the Board (Board Br., p. 35). Referring to a map which showed adjacent and intermediate points along State's proposed routes, Mr. Hill said that under State's catch-all clause it was willing to serve those points if the Board felt public interest required that service. There was no contention that State was entitled to roam all over the southeastern states area and accept a certificate for any route designated therein, irrespective of State's specific application.*

Equally misleading is the Board's contention that State in its brief before the examiners regarded every other applicant in the consolidated proceeding as a competitor for the routes involved (Board Br., p. 33). A consideration of this brief (R. 475-83) demonstrates that its assertion of a position "superior to that of any other new applicant seeking to serve this area" dealt only with the question of whether State had

*The same may be said of the phrase quoted by the Board (Board Br., p. 34) from the omnibus clause in State's exceptions to the examiners' report. Not only does this clause show on its face that it is related only to transportation forming a "logical part of the operating authority recommended * * * for State" (R. 529), but the phrase "not specifically sought by State" refers not to points not applied for but to points covered by State's application which, however, it had not sought in its brief before the examiners.

demonstrated sufficient fitness, willingness and ability to be awarded its routes. The comparison with other applicants was made not on the basis of competition for routes but solely for the purpose of showing State's fitness and ability by urging that its evidence on this subject was much superior to that of others. State did not consider the other applicants referred to as competitors for its routes across the mountains. Indeed, where others such as Commonwealth had applied for routes in part competitive with State, State's brief particularly dealt with that situation (Tr. 16206-7, referred to pursuant to R. 688-9).*

The final contention of both the Board and Piedmont is that State did not protect its own rights adequately before the Board and therefore cannot complain if it was injured (Pied. Br., pp. 23-4; Board Br., pp. 36-42). As the Board's decision could not have been anticipated, State could not have complained prior to its petition for reconsideration. In that petition, State alleged that as a result of the Board's action in certifying Piedmont for routes for which it had not applied, State had been deprived "of a fair hearing and due process of law" (R. 566 [10, 13]). In addition, on oral argument upon that petition, counsel for State made in detail the very argu-

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*It is not without significance to demonstrate what applicants generally considered the law to be, that Piedmont's counsel, in spite of the presence in this case of twenty-five other applicants who, according to the Board's and Piedmont's present theory, were all competitors of Piedmont, stated in his oral argument with respect to Piedmont's principal north-south route (R. 554):

> "Now the only other applicant for this route from Winston-Salem to Washington * * * is Virginia Stagelines, * * * *"

And he confined his argument as to this route to that "only other applicant". No one would have been quicker to rise in righteous indignation than Piedmont had the Board certified to State the Piedmont routes from Winston-Salem to Washington.

ments which have since been advanced in the courts (Tr. 16641-4; R. 605).

Specifying the manner in which State was aggrieved by the lack of due process in certifying Piedmont, counsel for State pointed out that there was no other applicant for State's trans-Appalachian routes and that

> "State made only casual cross-examination of Piedmont assuming that it could not possibly be considered an applicant for the routes for which State was applying. Similarly State put in no rebuttal evidence against Piedmont which it could have done if State had known that Piedmont could be considered for these routes" (R. 603-604).*

This specification of the manner in which State was deprived of due process of law was almost in the precise language in which the Board had refused to certificate Midwest in the *North Central Case*, 7 C. A. B. 639, *supra*, because its application gave no notice to others of any aspirations for the routes found necessary and accordingly (p. 674):

> "The other parties were thus deprived of an opportunity to submit evidence and to cross-examine as to the qualifications of Midwest to operate the more extensive route system herein contemplated."

Contrary to the Board's intimation, State had no opportunity (Board Br., p. 36) to introduce evidence as to Piedmont's shortcomings,** for the Board did not reopen the hearings but simply

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*These statements were in no way limited, as the Board erroneously suggests, to a showing that Piedmont had inadequate overhaul facilities (Board Br., p. 39). As the record indicates, that specific argument was made in answer to a proposition advanced by Piedmont's counsel and had nothing to do with State's general grievance (R. 608).

**Had State been given such opportunity it could have produced substantial evidence on this score (see *e. g.*, R. 629 [78-81]).

ordered a reargument and that reargument was limited to two questions, neither one of which dealt with Piedmont's fitness, willingness and ability to operate the route in question (R. 573-4).

Accordingly, the situation here presented is entirely different from *Market Street R. Co.* v. *Comm'n.*, 324 U. S. 548, much relied upon by Piedmont (Pied. Br., pp. 23-4) and the Board (Board Br., p. 37). There, this Court held (p. 558) that the issue of reasonableness of rates was plainly specified from the beginning of the proceeding; it was so stated in the Commission's original order instituting the proceeding; it was specified in the notice served upon the company. Under these circumstances, the company was fully advised of the issue tried by the Public Service Commission and, indeed, adduced much evidence on that very issue. The failure of the company to realize that the Commission might utilize in its decision evidence received without objection and without limitation, as to the price at which the company had offered to sell its properties, was held to be the company's own fault. On the record in the present case, however, it is impossible to see how State should have known that Piedmont was an applicant for that which it never sought.

5. NEITHER PIEDMONT NOR THE BOARD MEETS THE BASIC ISSUE RELATING TO THE ARBITRARY AND CAPRICIOUS ACTION OF THE BOARD IN HOLDING PIEDMONT FIT, WILLING AND ABLE TO OPERATE THE TRANSPORTATION CERTIFICATED (Reply to Board Br., pp. 42-52; Pied. Br., pp. 29-34).

The issues involved in the holding that Piedmont was fit, willing and able lie much deeper than the arguments of the Board and Piedmont indicate. State has never contended that the court is entitled to weigh evidence or to substitute its own

judgment for that of the Board. The court below did not hold that in order to be fit and able an applicant must "come forward with plans showing how it actually proposes to operate over each portion of the routes awarded" (Board Br., p. 43).

What State has contended and what the court below held was that the Board acted capriciously and arbitrarily when it certificated Piedmont in the absence of a scintilla of evidence relating to the operations certificated.

The statute under which the Board purported to act requires a finding "that the applicant is fit, willing, and able to perform *such* transportation properly" (Civil Aeronautics Act, § 401[d]; State Br., App. A, pp. ii-iii). An abstract finding of fitness, willingness and ability is not sufficient. The finding must relate to "such transportation", *i.e.*, the transportation certificated.

The Board has recognized, as we have shown (State Br., pp. 69-73), that the application of this Congressional standard compels the successful applicant to submit "a plan for the conduct of the service", *i.e.*, the service to be certificated. Furthermore *"each applicant"* must "meet the test of public convenience and necessity by showing a need for the service" and, among other things, "a cost to the Government in mail compensation bearing a reasonable relationship" to the probable use of the service and the character and quality thereof (*Local, Feeder, and Pick-up Air Service*, 6 C. A. B. 1, 4).

It is State's contention, concurred in by the court below in an incidental portion of its decision, that the foregoing tests adopted by the Board pursuant to the statute cannot reasonably be met by an applicant who concededly has produced no plan for the service certificated, has made no showing for the need of the service certificated, and has shown no cost to the Government for such service.

The Board itself has, prior to the present decision, consistently taken the same position (see cases cited State Br., pp. 69-74).

An example should be sufficient to show the arbitrary and capricious nature of the decision made in the complete absence of relevant evidence. Piedmont, as required by the Board's previous rulings, furnished an estimate of cost to the Government in mail pay for the operation covered by Piedmont's application. This was stated to be $330,785.31 for the first twelve months of operation (R. 383). The public records of the Board show that during the first twelve months of the operation certificated Piedmont actually received in mail pay $1,100,541.75 and has presently pending an application for increase in such pay. Can it be said that the Board acted reasonably on the basis of Piedmont's evidence, having no relation to the cost of the service actually certificated, when it made its decision in favor of Piedmont? How can the Board possibly have weighed the factor of cost to the Government in mail pay on any other than an arbitrary and capricious basis when it had before it not a single figure or estimate on Piedmont's part as to what such cost would be with respect to the transportation which the Board certified to Piedmont?

Illustrations could be multiplied. How could the Board possibly have had an intelligent or reasonable basis for deciding that Piedmont had a plan for operating adequate schedules into proper airports or had a proper concept of the utilization of airports or of the general type of equipment needed to fly the routes in question where there was not one scintilla of evidence on Piedmont's part with relation to the operation certificated?*

*The Board suggests, *dehors* the record, that its judgment has been vindicated by Piedmont's prompt and successful operation of the routes

Detailed comment seems unnecessary as to the Board's and Piedmont's specific arguments relating to evidence claimed to support the Board's findings of Piedmont's fitness, willingness and ability. It is not disputed by either the Board or Piedmont that not an item of evidence, not an exhibit, not a schedule, not a plan of operation was offered on behalf of Piedmont with respect to the trans-Appalachian operation certified. Whether the evidence would support a finding that Piedmont was fit, willing and able to operate the routes for which it applied and did introduce evidence seems wholly immaterial as a matter of law.*

The Board's argument that it may act without any evidence as to the transportation found necessary seems based, in part, upon the theory that it is not permitted to attach to a certificate of public convenience and necessity any condition restricting the right of an air carrier "to add or to change schedules, equipment, accommodations and facilities for performing the authorized transportation" (Civil Aeronautics Act, § 401[f]; Board Br., p. 48). By this provision Congress recognized that a carrier should be free within the limits of statutory safety requirements to change equipment, accommodations and facilities, and to change schedules to conform to technical progress and changing needs. This does not indicate any intention on the part of Congress to permit the Board to certify a new carrier

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certified (Board Br., pp. 40, 49, fn. 22). State denies that Piedmont commenced its operations promptly except in so far as it rushed into a premature operation on some of the routes certified for the evident purpose of presenting a *fait accompli* immune to court review (it has so argued; see, *e.g.*, Pied. Br., pp. 34-5). State further denies, on the basis of the Board's own records relating to Piedmont's accidents and its motion for increased mail subsidy, that Piedmont's operation has been safe, efficient or successful.

*A proposition laid down by the Board itself in *North Central Case*, 7 C. A. B. 639, *supra*, in rejecting the application of Midwest (at pp. 673-4).

without regard to that carrier's plans for operating on the routes to be certified. It seems absurd to contend that the Board, in making a supposedly reasoned decision under the Civil Aeronautics Act, may disregard all of the important factors relating to the operation to be certified. The plan of operation submitted by a carrier would appear to be the one essential piece of evidence needed to determine whether the carrier intends to meet the public need and whether it intends to operate and is capable of operating, at a reasonable cost to the Government, transportation in conformity with the basic safety requirements. The Board did not find anywhere that Piedmont submitted such a plan, or indeed any plan, for the routes certificated.

Finally, both Piedmont and the Board resort to an ineffective legalism when they urge that State, through some sort of a forensic estoppel by counsel, withdrew the objection as to the arbitrary and capricious nature of the Board's conclusion that Piedmont was fit, willing and able (Board Br., pp. 39, 45-6, fn. 19; Pied. Br., pp. 30-1).

In fact, most of State's petition for reconsideration by the Board dealt with the failure of the evidence to support the findings in favor of Piedmont (see Index R. 566 [i-ii]). In the petition, State plainly asserted (R. 566 [38]):

> "Consequently, it is impossible to consider Piedmont fit, willing and able for the routes awarded to it." (See also R. 566 [53-4].)

In oral argument counsel did not disown the petition (Tr. 16624-36). On the contrary, he contended at length that there was no evidence to support the finding of fitness as to Piedmont. A part of this discussion was introduced as follows (R. 602):

> "Turning now to the next important element in fitness, willingness, and ability, namely, 'a plan for the conduct of the service made by competent personnel.' It is on this phase of the case that we believe Piedmont completely falls down."

Much detailed argument to support this contention then follows (Tr. 16626-36; certified transcript referred to pursuant to R. 688-9). This phase of the case was concluded by counsel's statement (Tr. 16636):

> "On the other hand, Piedmont showed no plan for the operation of these routes, demonstrated no appreciation of scheduled air transportation matters * * * nor did it have financial and cost exhibits relating either to these routes or the character of operation which the Board intended."

In the light of this argument, counsel's intent in the passage quoted by the Board (Board Br., p. 46, fn. 19) is plain. He was endeavoring to make the point that an abstract finding of fitness, willingness and ability could be of no avail to Piedmont as Piedmont had neither applied for the routes in question nor put in any evidence as to its fitness respecting such routes. Counsel continued the line of thought with the suggestion that if the Board "selected American Air Lines for a route that they didn't apply for and didn't put in any evidence for and weren't an applicant, I would say that that didn't belong to them no matter how able they were" (R. 607).

6. THERE IS NO BASIS FOR THE CONTENTION THAT THE COURT BELOW LACKED POWER TO DIRECT THE BOARD TO ISSUE A CERTIFICATE, EITHER PERMANENT OR TEMPORARY, TO STATE (Reply to Board Br., pp. 52-60; Pied. Br., pp. 34-7).

State, of course, agrees with the contention that "no court may grant an authorization which a regulatory agency has re

fused" (Board Br., p. 52) and that the courts cannot dictate the manner in which agency discretion is to be exercised (Board Br., p. 53). The latter proposition is restated in the second exception to Section 10 of the Administrative Procedure Act, upon which the Board relies (Board Br., pp. 56-7).

These well-settled principles do not, however, control the issue here made.

The Board does not seem seriously to question State's fundamental proposition that where an administrative agency has exercised all discretion entrusted to it by Congress, the action, which Congress has directed should follow the exercise of that discretion, may be compelled by the courts. The Board's principal emphasis seems to be on arguments variously worded to leave the impression that there is still some discretion which the Board must exercise prior to granting the certificate pursuant to the direction of Congress. Of what this discretion is claimed to consist is not very clearly specified. Two principal points, however, appear to be made:

1. The Board contends that there were other applicants for the routes certificated who would be equally entitled to the certificate in question (Board Br., p. 54). This argument is contradicted by the record. The fact is that the Board, with respect to each of the applicants named in its present argument (Eastern Airlines, Delta Airlines and Pennsylvania Central Airlines), has specifically exercised its discretion to eliminate them from consideration. None of them, it may be added, applied for the route pattern covered by State's application, which the Board has now held to be the one required by public convenience and necessity. Eastern's application in the general area here involved was rejected on the ground that the service found necessary "can be provided better by a local operator as part of a feeder system than by a trunk-line operation" (R. 565 [876]).

The application of Pennsylvania Central was rejected because it had made no showing that its "services are required at this time" (R. 565 [875]). Delta was eliminated on the ground that the service in question "should be provided on a local or feeder basis rather than by a trunk-line carrier" (R. 565 [874]).

It was after a consideration of these applicants, as well as all other applicants, both trunk-line and feeder, that the Board exercised its discretion and found (R.565 [901]):

> "The choice has thus narrowed down to State Airlines and Piedmont Aviation, and which of these two companies should be selected to conduct the proposed service presents a close and difficult question."

Piedmont having now been eliminated, as a matter of law, it is obvious that State is the only applicant with respect to which the Board made the findings required by the statute.

2. The Board's other contention seems to be (Board Br., p. 57) that the finding of public convenience and necessity must be made not with respect to the transportation but with respect to State and that, therefore, the finding already made that public convenience and necessity required the transportation applied for by State is inadequate. This contention disregards both the statute and the Board's prior position not only in other cases but in its present brief. The statute requires that the Board must find that the successful "applicant is fit, willing, and able". But the finding as to public convenience and necessity is to be "that such *transportation* is required by public convenience and necessity" (Civil Aeronautics Act, § 401[d]; State Br., App. A, pp. ii-iii). The Board having made that specific finding with respect to the transportation here involved (State Br., p. 26), the statutory discretion on this score has been completely exhausted. Indeed, the Board

has recognized this, for, referring to its previous cases, it states (Board Br., p. 30):

> "* * * in an area proceeding the Board *first determines the routes required in the public interest* and thereafter selects the applicant found to be best qualified to perform the required service."

The Board can hardly be serious in its contention that State is not qualified for the certificate in question because the transportation authorized thereby does "not follow in all respects the specific routes and plan of operations proposed by State" (Board Br., p. 53). A peculiar logic must impel this argument when made by the Board which has insisted that Piedmont may be certificated for routes not covered by its application at all. State, of course, has never contended that the addition of some intermediate or adjacent points is beyond the Board's power. Certainly, here, where State's application is, for all practical purposes, identical with the routes found required by public convenience and necessity, there can be no claim that State is disqualified from receiving the certificate. The Board's argument appears to be made more as a rhetorical *tour de force* than a serious contention.

If the court is powerless to compel the Board to issue a certificate after it has made all of the determinations entrusted to it by Congress (*i.e.*, it has found the transportation in question to be required by public convenience and necessity and has found State fit, willing and able), then there will be conferred upon the Board an additional discretion which Congress did not intend at all. If the Board's position prevails, then it is entitled in its own unlimited discretion, irrespective of its findings, to determine whether or not a certificate shall be issued. In that event, there is no criteria whereby the Board's action is to be judged. Such a view might not only result in

creating an unconstitutional delegation of powers but is certainly at odds with the Congressional intent expressed in Section 401(d) of the Civil Aeronautics Act through the careful establishment of the criteria which the Board was to apply in determining whether to issue a certificate and the Congressional mandate that upon making the specified findings the Board "shall" issue the certificate.

The same answer applies to Piedmont's argument (not made by the Board) that the use of the word "may" in the second subdivision of Section 401(d) of the Civil Aeronautics Act shows an intention by Congress to confer untrammeled discretionary power to decide whether to issue a certificate even though the findings which would seem to require such issuance have been made (see Pied. Br., p. 37).* Such, plainly, was not the intention of Congress. The word "may" is not substituted in subdivision (2) for the word "shall" of subdivision (1). Congress in subdivision (2) gave the Board only additional discretion as to the length of time for which a certificate might issue by providing "the Board may issue a certificate * * * for such limited period of time as may be required by the public convenience and necessity". The proviso thus contained in subdivision (2) does not change the principle recognized by the Board that Section 401(d) as a whole "directs" the Board to issue a certificate (either permanent or temporary) once the appropriate findings have been made (State Br., pp. 23-4).

The Board's citation of *McGrath* v. *Zander*, — F. 2d — (Board Br., p. 57), emphasizes its misconception of the holding in *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134. In the *Zander* case, like in the *Broadcasting Co.* case, the ad-

*Contrary to Piedmont's suggestion as to what is here involved, State's application was for both a permanent and temporary certificate (R. 19).

ministrative agency had failed to make one of the requisite findings upon the basis of which its discretion alone was required to be exercised. There is nothing in either case, however, which militates against the rule laid down in *United States* v. *Hines*, 70 App. D. C. 36, 44, 103 F. 2d 737, 745, and other cases previously cited (State Br., p. 35), that when no further discretion is to be exercised, the administrative agency may be compelled by the courts to act in accordance with its findings.

That is the only contention which State has advanced with respect to Section 10(e) of the Administrative Procedure Act. Nothing in the memorandum attached to the Attorney General's letter and annexed to the report of the Senate Judiciary Committee (Board Br., pp. 57-8), contradicts such a construction of Section 10(e). Presumably, the Attorney General in his reference to *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, did not mean to go beyond the holding in that case and his comment, accordingly, has no relation to the situation where an applicant under the Civil Aeronautics Act has been found fit, willing and able and public convenience and necessity has been found. In such a situation there is no room for further "continuous administrative control". Only the ministerial action directed by Congress remains.

Upon the facts in this case, the only way to make the "adequate, fair, effective, complete, and just determination" intended by Congress under the Administrative Procedure Act,* is to require of the court below a proper mandatory order compelling action in accordance with the Board's discretion already exercised in State's favor. To permit the Board, in carrying out the mandate of the court below, to reconsider

*See State Br., pp. 31-2.

State's application in competition with Piedmont, which has been permitted by the Board to operate these routes for many months, not only nullifies State's appeal to the courts but is so contrary to the basic concepts of fair play in administrative proceedings that, it is submitted, this Court should not countenance such procedure.

CONCLUSION

In No. 158 the determination by the court below that it lacked power to make an order compelling the Board to issue a certificate of public convenience and necessity, either permanent or temporary, to State should be reversed with instructions to issue such order; in Nos. 157 and 159 the judgment below should be affirmed.

December 2, 1949.

Respectfully submitted,

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